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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. [redacted] 65

ELEANOR BROWN, BERTHA ALLEN, EDWARD ALLEN AND LOUIS BROWN, *Petitioners,*

v.

ADELE BROWN, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of Michigan, entered in the above-entitled case on February 18, 1954.

OPINIONS BELOW

The opinion of the Supreme Court of Michigan (R. 332) is reported in 338 Mich. 492. The order of the Supreme Court of Michigan denying the petitioners' motion for rehearing (R. 359) is unreported. The opinion of the Circuit Court for the County of Wayne on petitioners' motion for judgment notwithstanding the verdict or, in the alternative, for a new trial (R. 332), is unreported.

JURISDICTION

The opinion of the Supreme Court of Michigan was entered on December 29, 1953 (R. 341). The judgment of the Supreme Court denying petitioners' motion for rehearing was entered on February 18, 1954 (R. 359). The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3).

The federal issues necessarily were raised for the first time in the petitioners' motion for rehearing addressed to the Supreme Court of Michigan, which motion is a part of the certified record before this Court (R. 343). These issues appeared for the first time in the opinion of that Court dated December 29, 1953, and could not have been anticipated by the petitioners at an earlier stage. The motion for rehearing which raised these federal issues was denied without opinion. Under these circumstances, this Court has jurisdiction to consider the federal issues. See *Brinkerhoff-Faris Trust Co.* v. *Hill,* 281 U.S. 673, 677-678.

QUESTIONS PRESENTED

1. Whether Article I, Section 10, of the Constitution of the United States is violated where a state court, in a civil suit, interprets a custody statute in such a way as to result in the ex post facto application of criminal statutes.

2. Whether a state court may, consistent with the due process clause of the Fourteenth Amendment of the Constitution of the United States, interpret a custody statute in such a way as to result in the ex post facto application of criminal statutes and the issuance of a *nunc pro tunc* custody order without notice or hearing to the affected parent.

STATUTES INVOLVED

Sec. 25.311 of the Mich. Stat. Ann.—"In case of the separation of husband and wife having minor children, the mother of said children shall be entitled to the care and

custody of all such children under the age of twelve (12) years . . . *provided, further,* that nothing in this act shall prevent any court of competent jurisdiction from making and enforcing any such order or orders as it may deem just and proper as to the care and custody of such minor children in the same manner and with like effect as it could if this act had not been passed."

Sec. 28.582 of the Mich. Stat. Ann.—"Any person who shall maliciously, forcibly or fraudulently lead, take or carry away, or decoy or entice away, any child under the age of fourteen (14) years, with intent to detain or conceal such child from its parent or guardian, or from the person or persons who have lawfully adopted said child or from any other person having the lawful charge of said child, shall be guilty of a felony, punishable by imprisonment in the state prison for life or any term of years."

Sec. 28.773 of the Mich. Stat. Ann.—"Any person who shall commit any indictable offense at the common law, for the punishment of which no provision is expressly made by any statute of this state, shall be guilty of a felony, punishable by imprisonment in the state prison not more than five (5) years or by a fine of not more than two thousand five hundred (2500) dollars."

STATEMENT

Respondent brought a damage suit in the Circuit Court for Wayne County, Michigan, against the petitioners, who were the in-law relatives of the respondent prior to her divorce (R. 26-46). The first count alleged that the petitioners conspired to alienate the affections of respondent's former husband, William H. Brown. The second count alleged that the petitioners conspired to abduct and deprive the respondent of the custody of the two minor children under the age of 12 that had been born to her and her former husband. These two children had been taken by their father, with respondent's permission, although the

respondent did not know that the father intended to take them to South Africa. A divorce suit was pending at that time, but no divorce decree had been entered. It was alleged that the action of the father in taking the children to South Africa was accomplished with the collusion and conspiracy of the petitioners—that they did "maliciously, forcibly, deceitfully, and fraudulently lead, take, carry away, decoy, and/or entice and induce" the children to South Africa (R. 31). It was further alleged that respondent had been put to great expense and had suffered illness as a result of her efforts to discover the whereabouts of the children and to regain possession of them. (R. 37).

After trial, the jury awarded damages to the respondent in the amount of $50,000 on the first count and $150,000 on the second count (R. 279-280). Judgment in that amount was entered by the trial court on April 30, 1953 (R. 316), and petitioners' motion for judgment notwithstanding the verdict or a new trial was denied by the court on May 29, 1953 (R. 325). The trial court's judgment was affirmed on appeal to the Supreme Court of Michigan (R. 341).

The federal issues which the petitioners wish to bring before this Court arise out of that portion of the judgment below which affirmed the award of $150,000 to the respondent by reason of the alleged conspiracy to abduct the children. That portion of the judgment was necessarily premised on the finding and conclusion that the respondent was legally entitled to the custody of the minor children at the time when the children's father took them to South Africa, that his act of taking them from the mother constituted the crime of abduction, and that the actions of the petitioners herein constituted the crime of conspiracy to bring about such abduction.

The record shows, however, that custody of the children was not awarded to the respondent until May 10, 1950, when an order was entered *nunc pro tunc* as of January 16, 1950 (R. 288). It was on the latter date that an order of temporary alimony had been entered, saying nothing

about an award of custody but ordering the father to pay $30 per week to respondent "for the support and maintenance of the Plaintiff (respondent herein) and the minor children."

The record further shows (R. 291) that the father removed the children from respondent's care on or about March 31, 1950—some 40 days prior to the entry of the *nunc pro tunc* custody order of May 10, 1950. This fact was admitted in the opinion of the Supreme Court below (R. 335). And as of June 7, 1950, the father had not returned to the United States with the children (R. 294). There is no evidence, as indeed there cannot be, that the husband was ever given any notice or hearing leading to the entry of the *nunc pro tunc* custody order of May 10, 1950. It was entered without his knowledge at a time when he was outside the country and was made retroactive to January 16, 1950—thereby retroactively illegalizing the actions of the father on March 31, 1950, and the actions of the petitioners relative to the alleged conspiracy.

On appeal to the Supreme Court of Michigan, the petitioners maintained that the *nunc pro tunc* order of May 10, 1950, was illegal under Sec. 25.311 of Mich. Stat. Ann., which provides "that in the case of the separation of husband and wife having minor children, the mother of said children shall be entitled to the care and custody of all such children under the age of twelve (12) years." As shown later herein (*infra*, p. 7), this statute previously had been read to require an express order, following notice and hearing, before custody was legally lodged in the mother.

But in this case the Supreme Court for the first time interpreted this statute to mean that no express order of custody is necessary, at least where a *nunc pro tunc* order is subsequently entered, in order to give the mother exclusive custody of minor children (R. 335). In other words, the statute was interpreted to give absolute custody to the mother despite the fact that no hearing or notice was

given to the father and despite the fact that no order of custody had been entered at the time the custody became effective. This necessarily means under these circumstances that, upon the entry of the *nunc pro tunc* custody order, the father who before entry of the *nunc pro tunc* order took the children from the mother is retrospectively guilty of the crime of abduction. Sec. 28.582 of Mich. Stat. Ann. And anyone who conspired to bring about such an abduction is retrospectively guilty at common law of the crime of conspiracy, which is punishable under Michigan law. Sec. 28.773 of Mich. Stat. Ann.[1] Only after it had been determined that these crimes had been committed could the Supreme Court of Michigan affirm the award of $150,000 to respondent for damages growing out of the commission of those crimes.

It is also pertinent to note that on February 28, 1951, the Recorder's Court for the City of Detroit—a court of record—rendered a decision (*People* v. *Brown*) to the effect that the father, William H. Brown, could not be held on kidnapping charges because at the time he took the children custody had not been awarded to the mother. That court specifically held that the *nunc pro tunc* custody order of May 10, 1950, was ineffective to create a criminal offense on March 31, 1950, the date of the taking, in view of the ex post facto doctrine. This opinion, of which this Court may take judicial notice, is appended at the end of this petition (*infra*, p. 13).

SPECIFICATION OF ERRORS TO BE URGED

The Supreme Court of Michigan erred:

1. In holding that an award of damages resulting from an abduction could be sustained where the determination of the crimes of abduction and conspiracy to abduct was

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[1] Conspiracy to commit a felony, such as abduction, is a crime at common law and hence is punishable under Sec. 28.773 of Mich. Stat. Ann. See *People* v. *Smith*, 296 Mich. 176; *People* v. *DeLano*, 318 Mich. 557.

premised on an ex post facto application of pertinent criminal statutes.

2. In holding that a custody award, which resulted in the ex post facto application of the criminal statutes, may be made without notice or hearing to the affected parent.

3. In affirming the jury's award of damages in the absence of sufficient evidence to sustain that award, such evidence or lack of it being pertinent to the resolution of the constitutional issues.

REASONS FOR GRANTING THE WRIT

1. It was timely to raise the federal questions for the first time in the motion for rehearing addressed to the Supreme Court of Michigan. Those federal questions were created by the unexpected decision of that Court, there being no prior opportunity for the petitioners to anticipate or assert these questions. They could not have anticipated that the custody statute would be interpreted as it was or that the petitioners would be labeled guilty of the crime of conspiring to commit abduction. Under established doctrine, therefore, the federal questions were timely raised, even though the motion for rehearing was summarily denied without reference to the federal questions. See *Great Northern R. Co.* v. *Sunburst Oil Co.*, 287 U.S. 358, 366-367; *Brinkerhoff-Faris Trust Co.* v. *Hill*, 281 U.S. 673, 677-678; *Ohio ex rel. Bryant* v. *Akron Park District*, 281 U.S. 74, 79; *Missouri ex rel. Missouri Ins. Co.* v. *Gehner*, 281 U.S. 313, 320; *Saunders* v. *Shaw*, 244 U.S. 317, 320.

That the petitioners could not have anticipated these federal issues, all of which grow out of the interpretation of the custody statute (Sec. 25.311 of Mich. Stat. Ann.), is readily apparent. Previously that statute had always been interpreted to mean that the right of the mother to the custody of children under 12 was not thereby absolute or mandatory. *Johnson* v. *Johnson*, 318 Mich. 21; *Riede* v.

Riede, 300 Mich. 300; *Mault* v. *Elliott,* 329 Mich. 544; *Weiss* v. *Weiss,* 174 Mich. 431. Under this statute, a court was bound to consider the welfare of the children and the relative claims of the parents. Notice and opportunity for hearing to both parents constituted an inherent part of this procedure. Then and then only could the court determine what action, under the circumstances, was just and proper. *Mault* v. *Elliott, supra.* Indeed, the Supreme Court of Michigan in an analogous situation has spoken of the requirement of notice before depriving either parent of custody as "jurisdictional." *Oversmith* v. *Lake,* 295 Mich. 627.

Moreover, the petitioners were entitled to rely on the decision of the Recorder's Court in *People* v. *Brown, infra,* p. 13, where the court, in dealing with the very facts involved in this proceeding, held that "by a close reading of said [custody] statute one cannot find the statute awards custody . . . The mother may be prima facie entitled to the custody of the minor children under twelve but the actual awarding of their exclusive custody is a matter of court determination and order, before the crime of kidnapping can be committed. . . . In the present case there was no order, temporary or permanent, dealing with or fixing custody prior to the date of the alleged offense."

But in the instant case, the Supreme Court of Michigan ignored its past rulings and disregarded the reasoned opinion of the Recorder's Court in *People* v. *Brown* and held for the first time that notice and hearing could be dispensed with and a *nunc pro tunc* ordered entered, making custody in the mother retroactively effective to a time before the father took the children. Thus the petitioners had no earlier opportunity to raise the federal questions.

The ex post facto question, under Article I, Section 10, of the federal Constitution, was explicitly raised on pages 4-8 of the motion for rehearing (R. 347-351). The due process issue under the Fourteenth Amendment was raised on page 8 of the motion for rehearing (R. 351).

2. Petitioners' contention that the judgment below results in an ex post facto application of criminal liability raises an important issue under Article I, Section 10, of the Constitution which has not been but should be resolved by this Court.

It is true, of course, that the prohibition of ex post facto laws relates only to penal and criminal proceedings which impose punishments and forfeitures, and not to civil proceedings which affect private rights retrospectively. *Watson* v. *Mercer,* 8 Pet. 110. While the instant case is a civil damage suit it necessarily involves a determination of criminal liability on an ex post facto basis, which could be the basis of a criminal proceeding against the petitioners. Time and again the Supreme Court in its opinion refers to the crimes of abduction and conspiracy to abduct as having been committed by the father and the petitioners—crimes which are crimes only because of an ex post facto application of the pertinent laws. The fact that this is primarily a civil suit should therefore not preclude the petitioners from objecting to an ex post facto determination by the Michigan Supreme Court that petitioners committed the felony of conspiring to commit abduction. We have here a unique situation where civil liability depends upon criminal liability. In that situation the constitutional safeguards relating to criminal liability should be fully applicable.

That the fear of actual criminal prosecution is a real and not an imaginary one is demonstrated by the action in *People* v. *Brown, infra,* p. 13. There the father was relieved of criminal responsibility for abduction only because of an interpretation of the custody statute, an interpretation which has been reversed by the Supreme Court below. Unless this Court reviews and reverses the decision below, there is no hurdle to the ex post facto application of the abduction and conspiracy statutes to the father and the petitioners.

Assuming the correctness of the jury's determination of the facts, it is clear that when the so-called conspiracy on

the part of the petitioners was in effect there was no judicial order placing custody of the minor children in the mother. The act of the father in taking the children away thus could not at that point have constituted the crime of abduction, the father being the natural guardian of his children. See *People* v. *Brown, infra,* p. 14. Nor could the acts of the petitioners in furtherance of the conspiracy have amounted at that point to the crime of conspiring to commit the felony of abduction under the common law and hence could not have been punishable under Sec. 28.773 of Mich. Stat. Ann.

It was only after the court below held that the *nunc pro tunc* custody order was retroactively effective as of a date prior to the father's taking of the children that the court could describe the father's action as that of abduction and the petitioners' actions as those of conspiring to commit abduction—all of which are crimes under Michigan law. The fact that it was determined that the mother retroactively had custody—retroactively including the crucial date of March 31, 1950—was the basis for the declaration of ex post facto criminal liability on the part of the petitioners and the father.

Thus we have a classic illustration of an ex post facto application of criminal liability. What was not a crime on March 31, 1950, was subsequently made a crime by a retroactive application of the custody order of May 10, 1950. Such a patent violation of the ex post facto provision of the Constitution should not escape condemnation. The fact that this Court has not had the occasion to examine the scope of that provision in cases where civil and criminal liabilities are intertwined is all the more reason why a review should be had. It involves an important issue meriting the considered attention of this tribunal.

3. Closely allied with the ex post facto issue is that of the lack of due process in the entering of the *nunc pro tunc* custody order, which resulted in the ex post facto application of the criminal laws.

That order was issued without any notice to the father or opportunity for hearing. Had such a hearing been had, the father might have been able to demonstrate his right to the custody of the children and the crimes of abduction and conspiracy to abduct could not have taken place on an ex post facto basis. In light of the clear constitutional command that notice and opportunity for hearing be afforded before substantial rights may be effected, the interpretation of the custody statute in a manner inconsistent with that command raises a substantial issue under the due process clause of the Fourteenth Amendment. See *Anderson Nat. Bank* v. *Luckett*, 321 U.S. 233, 246; *Twining* v. *New Jersey*, 211 U.S. 78, 111; *Postal Telegraph-Cable Co.* v. *Newport*, 247 U.S. 464, 476; *Jacob* v. *Roberts*, 223 U.S. 261; *Simon* v. *Craft*, 182 U.S. 427.

This issue was adequately raised on page 8 of the motion for rehearing (R. 351). Under the peculiar circumstances of this case, where the issue is meshed with the ex post facto question, the reference on that page to the lack of notice in conjunction with the explicit references to Article I, Section 10, of the Constitution is sufficient to demonstrate that the due process issue was claimed by necesary intendment. See *Oxley Stave Co.* v. *Butler County*, 166 U.S. 648; *Sayward* v. *Denny*, 158 U. S. 180; *Kipley* v. *Illinois*, 170 U.S. 182.

4. Petitioners also claim that the evidence relating to the determination that they engaged in an unlawful conspiracy to abduct the respondent's minor children is insufficient to support the jury's verdict. If the federal issues raised by petitioners are deemed worthy of review by this Court, they request the opportunity to urge that the facts underlying those constitutional questions were improperly resolved in the courts below. *Fiske* v. *Kansas*, 274 U.S. 380, 385-386; *Chambers* v. *Florida*, 309 U.S. 227, 228-229.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari to the Supreme Court of Michigan should be granted.

Respectfully submitted,

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May 7, 1954

APPENDIX

STATE OF MICHIGAN

IN THE RECORDER'S COURT FOR THE CITY OF DETROIT

File #A-62452

PEOPLE OF THE STATE OF MICHIGAN, *Plaintiff*

—VS—

WILLIAM H. BROWN, *Defendant*

On February 20th, 1951, the above captioned matter came before me for examination. No testimony was taken but in lieu thereof the following facts were stipulated.

(a) That William Brown and Adele Brown were and still are husband and wife and the parents of two minor children, one five (5) and the other nine (9) years of age;

(b) That Mrs. Brown as the plaintiff and Mr. Brown the defendant in a divorce action (Circuit Court File #454,037) which was instituted on or about October 28, 1949;

(c) That on January 15th, 1950, Judge Miles Culehan issued an order for temporary alimony requiring the defendant to pay thirty dollars ($30.00) per week for the support and maintenance of the plaintiff (Adele Brown) and the two minor children;

(d) That although no order was entered as to the custody of said two minor children, they were living with their mother from the date of the separation of the parties until they were taken by William H. Brown (defendant named in both the divorce case and the present kidnapping matter) to various places throughout the world including Johannesburg, South Africa;

(e) That on or about May 10th, 1950, and upon petition of the plaintiff, Judge Culehan entered an order granting custody of the two minor children to Mrs. Brown and made it nunc pro tunc in nature effective as of January 16th, 1950;

(f) That on or about December 20, 1950, a criminal warrant, upon the complaint of Adele Brown, issued charging the defendant with the offense of kidnapping and that the defendant was taken into custody in the City of Chicago, Illinois.

The matter was argued at great length on February 20th, briefs filed and then adjourned until today for decision.

It is a certainty that the temporary alimony order of January 16th, 1950, either in wording or caption, did not determine the question of custody as to said two (2) minor children and the nunc pro tunc order, dated sometime in May, 1950, could not be effective or controlling as to a criminal offense which is alleged to have occurred on or about March 31st, 1950. It is fundamental that ex post facto laws cannot be enacted making something a crime which was not a crime when committed.

The people claim Section 25.311, Michigan Statutes Annotated, gave custody to the mother even if the January 16th order did not. It is true said statute provides that in case of separation of the husband and wife having children under twelve years of age, the mother shall be entitled to their care and custody. However, by a close reading of said statute one cannot find the statute awards custody. It merely contains the phrase, "shall be entitled to". The mother may be prima facie entitled to the custody of the minor children under twelve but the actual awarding of their exclusive custody is a matter of court determination and order, before the crime of kidnapping can be committed. Annotation listed in 77 A.L.R. at page 317 discusses criminal accusations against parents. The decisions are more or less unanimous that if the custody of a child is awarded one parent by a decree of the court and the other parent takes or carries away said child with the intent to detain or conceal it . . . the crime or kidnapping is committed but the decisions are equally unanimus in saying, "kidnapping does not lie against a parent where the custody is in dispute or not as yet determined". There are some decisions which hold that final custody is not decided by temporary orders, but by final decrees. In the present case there was no order, temporary or permanent, dealing with or fixing custody prior to the date of the alleged offense.

At common law the father was looked upon as a natural guardian of his child and had the primary right to his

custody. The above statute (25.311) says the mother is entitled to the care and custody when the parents are separated and the children are under twelve years of age. There is nothing in either provision which interferes with the right of a court of competent jurisdiction upon investigation and consideration of the best interests of a minor child to commit said child to the custody of either the father, or the mother, or some other suitable person.

Both sides refer to the Knott case 162 Michigan, Page 16. This was a civil case decided entirely upon the sufficiency of the return to a writ of habeas corpus. What it says about custody is purely a matter of dictum and, of course, not controlling, especially in a criminal case. The Nelson case reported in 322 Michigan 262 shows a reversal of a conviction for kidnapping on the part of the father's brother. The matter of prior orders or no orders as to custody come into play somewhat but this court feels the case was reversed because the people failed to prove felonious intent in that the defendant was merely acting at the suggestion of the father of the child and said respondent was not fully acquainted with all the facts and particulars. The court finds the Hard vs. Splain case, 45 App. Cases D.C. 1 (9) more controlling.

Much has been said in the People's brief as to what Judge Culehan meant or said in relation to his prior order of January 16th. All of this is answered by the simple statement, "a court speaks through its judgments and decrees and not through its opinion".

Whether defendant is guilty of contempt of court is another matter and not of concern to this court. The showing made by the people in this case at the examination is not sufficient to hold the defendant for trial on the charge of kidnapping. The respondent is discharged and his bond cancelled.

JOHN J. MAHER

John J. Maher
Recorder and Judge
The Recorder's Court

JJM:me
February 28, 1951.